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Order 98-12-29

SERVED December 23, 1998



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 22nd day of December, 1998

Application of

LEGEND AIRLINES, INC.

for a certificate of public convenience and necessity under 49
U.S.C. 41102 to engage in interstate scheduled air
transportation of persons, property and mail

Docket OST-98-3667

FINAL ORDER

By Order 98-10-15, issued October 16, 1998, we directed all interested persons to show cause why we should not make final our tentative findings and conclusions stated therein and award a certificate of public convenience and necessity to Legend Airlines, Inc., authorizing it to engage in interstate scheduled air transportation of persons, property, and mail. Interested persons were given 14 days to file objections to the order.

The Pleadings

On October 29, 1998, we received an answer from the Love Field Citizens Action Committee (Citizens Committee). The Citizens Committee argues that Legend's application to operate large aircraft out of Dallas' Love Field should not be approved.¹ In support of its position, it reiterates some of the arguments contained in its initial comments in this proceeding.² Specifically, the Citizens Committee asserts that Legend's proposal to serve Love Field is not consistent with the regional airport plan for the Dallas-Fort Worth metroplex which calls for the concentration of scheduled passenger services at Dallas-Fort Worth International Airport (DFW). The Citizens Committee also restates its argument that the Department must conduct an environmental impact statement in accordance with Chapter 3, Sections 32 and 34 of the Policies and Procedures for

¹ Legend's business plan indicates an intent to operate DC-9 aircraft reconfigured with 56 seats to various U.S. cities from Love Field.

² See Citizens Committee answer filed April 27, 1998.

Considering Environmental Impacts (the “Environmental Policies”) as published by the Federal Aviation Administration (FAA).³

On November 4, Legend filed its response. In general, Legend argues that the comments of the Citizens Committee are simply part of a continuing plan on the part of American Airlines to thwart Legend’s attempts to commence its proposed operations.⁴ As such, Legend argues that the Citizen Committee’s comments should be disregarded and the Department should expeditiously move not only to issue the applicant its requested certificate, but also to decide the issues included in the *Love Field Service Interpretation Proceeding* (Docket OST-98-4363).

Legend notes that the Department’s show cause order already addressed the Citizens Committee’s argument that Legend’s operations are not consistent with the Dallas-Fort Worth regional airport plan. Legend further states that its operations will have no material impact on the airspace, airport, or the area surrounding Love Field. Legend states that its position in this regard comports with findings that the Department has made in the past; specifically, that additional operations will neither have a negative impact on Love Field with respect to safety, noise or congestion, nor denigrate the viability of operations at DFW.⁵

Moreover, given the current level of operations at Love Field, Legend argues that its limited service proposal, involving 12 daily roundtrips initially, does not trigger the need for an environmental impact statement. Legend states that its initial flights will be scattered throughout the day and, thus, any effect on the roads and airport facilities will be minimal. Legend notes that other Love Field operations are more substantial than Legend’s proposed services: it cites that American Airlines already provides 14 daily round trips between Love Field and Austin, that Southwest Airlines provides considerable service at Love Field (at present, approximately 250 flights per day), and that the general aviation operations into and out of Love Field continue to increase.

³ The Citizens Committee contends that Legend’s services will adversely impact the environment around Love Field, an area which includes, among other things, schools, parks, medical facilities, and residential dwellings. In this regard, it predicts that if Legend is authorized to operate out of Love Field, other airlines will follow, creating a “domino effect directly resulting in a massive increase in flights that will have the cumulative effect of substantially adversely impacting the quality of the environment” in the Love Field area. (Citizens Committee answer at p.6.) The Citizens Committee states that the Department’s 1992 *Analysis of the Impact of Changes to the Wright Amendment* did not constitute an environmental impact statement as required by the National Environmental Policy Act.

⁴ In this regard, Legend asserts that American has used third parties to raise unfounded issues with regard to Legend’s proposed operations and notes that the Citizens Committee has received substantial funding from American.

⁵ Legend argues that the impact of allowing new services at Love Field will be “positive--new jobs, new travel options for Dallas-Fort Worth areas businesses, economic growth for the community and huge fare savings.” (Legend reply at p.8.)

Decision

We have carefully considered the Citizens Committee's objections and have decided to adopt in full the tentative findings and conclusions stated in Order 98-10-15.⁶

We stated in the show-cause order that any inconsistency between Legend's service proposal and the Dallas-Fort Worth regional airport plan, as the Citizens Committee alleges, is not a basis for denying Legend's application, since the Airline Deregulation Act ended all of our authority to designate which domestic routes may be operated by an airline, and we have no authority to require Legend to serve a particular airport. The Citizens Committee has provided no new information on this issue in its answer. Moreover, concurrent with the issuance of this final order, the Department is issuing its decision in the *Love Field Proceeding* referred to earlier (*see* Order 98-12-27). That order concludes that the type of operations Legend proposes to conduct out of Love Field are consistent with our interpretation of federal law.

In addition, we do not agree with the Citizens Committee's assertion that an environmental impact statement is necessary before we may issue Legend its certificate. First, the Environmental Policies cited by the Citizens Committee in support of its claim do not apply to fitness determinations. Those that do, found at DOT Order 5610.1C, establish a general categorical exclusion from environmental assessment or environmental impact statement specifically for such determinations (at section 4.c.(6)(d)). Categorical exclusion treatment is appropriate because fitness determinations address whether an applicant possesses the managerial competence, financial resources, and compliance disposition required in order for it to be authorized by the Department's Office of the Secretary to provide air transportation. The authority that is granted is not specific to any airport or airports,⁷ nor are operational details like the flight paths that would be utilized taken into consideration. Without such a context, the finding that is made thus would not be expected to "significantly affect...the environment"--the legal prerequisite to preparation of an environmental impact statement under the National Environmental Policy Act.

The Citizens Committee has offered various reasons why an environmental impact statement might be justified, *e.g.*, that the fitness action is likely to be highly controversial on environmental grounds, or that a startup by Legend at Love Field could lead to other carriers instituting flights into that airport.⁸ However, the nature of our action here is not to authorize operations into Love Field specifically, but, rather, to authorize Legend to operate. We see no environmental controversy appearing in connection with the act of authorizing Legend to operate, nor is a

⁶ As noted in the show-cause order, we will not make Legend's authority effective until it has complied with a number of conditions, including receipt of appropriate FAA authority and the necessary financing to meet our financial fitness criteria. Moreover, if there is any material change in Legend's business plan, it will need to file a revised plan with us for our review.

⁷ In fact, the only airport-specific reference in the certificate issued by OST is a *restriction* on flights from Love Field, a restriction which is included in all air carrier certificates.

⁸ In this regard, we note that Legend's proposed services would not be the first jet services offered at Love Field, and that, if authorized, such operations would constitute only a small portion of the large jet aircraft flights at that airport.

favorable determination on Legend's fitness, without more, likely to generate operational adjustments by other carriers.

This is not to argue that operations Legend might ultimately perform at Love Field should escape environmental scrutiny, just that the environmental issues raised by the Citizens Committee are not properly considered in the context of this fitness proceeding. Legend has, however, filed an application for operating authority from the FAA. That application, by its nature, more directly relates to Legend's proposed operations at Love Field. The need for any environmental review in connection with that application, or in regard to any subsequent FAA actions, would be determined by the FAA in accordance with its environmental policies and procedures.

In light of the above, we will finalize our tentative findings set out in Order 98-10-15, and find Legend fit to engage in interstate scheduled passenger operations and award the company a certificate authorizing it to do so.⁹

ACCORDINGLY,

1. We find that Legend Airlines, Inc., is fit, willing, and able to engage in interstate air transportation of persons, property, and mail.
2. We issue a certificate of public convenience and necessity to Legend Airlines, Inc., authorizing it to engage in interstate air transportation in the form and subject to the Terms, Conditions, and Limitations attached.
3. We direct that, once its certificate becomes effective, should Legend Airlines, Inc., propose to utilize more than four aircraft in its operations, it must first notify the Department in writing at least 45 days in advance and demonstrate its fitness for such operations prior to placing additional aircraft into service.¹⁰
4. We direct that, once its certificate becomes effective, within 45 days following the end of the first year of actual flight operations, Legend Airlines, Inc., shall provide the Department's Air Carrier Fitness Division with a detailed progress report on its operations. The report should include a description of the carrier's current operations (number and type of aircraft, principal markets served, total number of full-time and part-time employees), a summary of how these operations have changed during the year, a discussion of any changes it anticipates from its

⁹ In its November 4 response, Legend noted certain corrections to the background information on three of its key personnel--Joel Fisher, Michael Cohen, and Bruce Leadbetter. We have reviewed these changes and find that they do not constitute material changes that would alter our tentative conclusions that Legend will have adequate management.

¹⁰ Furthermore, in accordance with the Department's Notice dated July 21, 1998, Legend Airlines is requested to give the Department a 30-day advance notification of any proposed change in ownership, restructuring, or recapitalization. This notice should be submitted to the Air Carrier Fitness Division. The carrier may contact the Fitness Division prior to submitting its notice to determine what fitness information should be provided.

current operations during its second year, current financial statements,¹¹ and a listing of current senior management and key technical personnel.¹²

5. We will serve a copy of this order on the persons listed in Attachment A to this order.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov>*

¹¹ These financial statements should include a balance sheet as of the end of the company's first full year of actual flight operations and a 12-month income statement ending that same date.

¹² The carrier should also be prepared to meet with staff members of the Fitness Division to discuss its current and future operations.



**Certificate of Public Convenience and Necessity
for
Interstate Air Transportation**

This Certifies That

LEGEND AIRLINES, INC.

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in interstate air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 98-12-29
On December 22, 1998
Effective on (see attached)**

**Charles A. Hunnicutt
Assistant Secretary for Aviation
and International Affairs**



Terms, Conditions, and Limitations

LEGEND AIRLINES, INC.

is authorized to engage in interstate air transportation of persons, property, and mail between any point in any State, territory, or possession of the United States or the District of Columbia, and any other point in any of those entities.

This authority is subject to the following provisions:

- (1) The authority to operate under this certificate will not become effective until six (business) days after the Department has received the following documents; provided, however, that the Department may stay the effectiveness of this authority at any time prior to that date:
 - (a) A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA).
 - (b) A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR 205.5(b) for all of its aircraft.
 - (c) A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case.
 - (d) A revised list of pre-operating expenses already paid and those remaining to be paid, as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.
- (2) Pending receipt of effective authority, the holder may not accept payment of any kind (i.e., cash, check, or credit card) or issue tickets for the operations proposed under this certificate, and any advertisement or listing of flights by the holder must prominently state: "This service is subject to receipt of government operating authority."

(3) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

(4) The holder's authority is effective only to the extent that such operations are also authorized by the FAA.

(5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).

(6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

(7) In the event that the holder receives effective scheduled passenger authority, the following additional conditions will apply:

(a) The holder may reduce or terminate service at any point or between any two points, subject to compliance with the provisions of 49 U.S.C. 41734 and all orders and regulations issued by the Department of Transportation under that section.

(b) The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended by section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998.

(8) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.

(9) In the event that the holder does not commence actual flying operations under this certificate within one year of the date of the Department's determination of its fitness, its authority shall be revoked for dormancy, unless the holder is conducting operations under another type of certificate authority. Further, in the event that the holder commences operations for which it was found "fit, willing, and able" and subsequently ceases all such

operations, its authority under all certificates held shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

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